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Gabriel J. Chin
University of Arizona, James E. Rogers College of Law

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UNJUSTIFIED: THE PRACTICAL IRRELEVANCE OF THE JUSTIFICATION/EXCUSE DISTINCTION†

Gabriel J. Chin*

INTRODUCTION

In recent decades, the distinction between justification and excuse defenses has been a favorite topic of theorists of philosophy and criminal law. Paul Robinson offers this representative general definition:

> Justified conduct adheres to the criminal law's rules of conduct and is to be encouraged (or at least tolerated) in similar circumstances in the future. . . . An excuse, in contrast, represents a legal conclusion that the conduct is wrong and undesirable, that the conduct ought not to be tolerated and ought to be avoided in the future, even in the same situation. Criminal liability nonetheless is inappropriate because some characteristic of the actor or the actor's situation vitiates the actor's blameworthiness.[1]

Scholars, notably including Reid Fontaine, whose article[2] is the subject of this Symposium, vigorously debate whether duress,[3] heat of passion mitigation[4] and other defenses[5] are justifications or excuses as a general matter.

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* Chester H. Smith Professor of Law, University of Arizona, James E. Rogers College of Law. Email: gchin@aya.yale.edu. Warm thanks to Dan Markel, Marc Miller and Peter Westen for generous and helpful comments on an earlier draft. I am particularly grateful to Reid Fontaine for our many discussions on these and related issues, which led to an invitation to participate in this Symposium.

1. PAUL ROBINSON, CRIMINAL LAW § 9.1, at 479 (1997); *see also, e.g.*, Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 325 (2006) (arguing that most commentators assume "that justification stands for conduct that is right and good (or at least not wrong and bad), and that excuse stands for conduct that is wrongful but blameless.").

2. Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009).

3. *Compare* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—and Why it Matters*, 6 BUFF. CRIM. L. REV. 833 (2003), *with* Kyron Huigens, Commentary, *Duress is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303 (2004).

4. *See* Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCHOL. PUB. POL'Y & L. 143, 147 n.6 (2007).

5. Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275858 (noting

The distinction is important as a matter of legal philosophy,[6] because it describes reasons for withholding criminal liability.[7] However, as Professor Westen writes, "[t]he measure of any internally-consistent distinction between justification and excuse is its *usefulness*."[8] Its utility to the criminal justice system—to judges, juries, legislatures, law students and lawyers—has not yet been demonstrated.[9]

Principally at stake is the distinction's potential (rather than current) utility to the criminal justice system. The justification/excuse distinction plays no significant role in contemporary criminal doctrine.[10] For example, the legal consequence of a successful defense

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that categorization has been controversial with defenses of provocation, duress, self-defense, mistake of fact and insanity).

6. *See, e.g.*, R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN CRIMINAL LAW 263–98 (2007); Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387 (2005). Some are more skeptical of the value of the distinction. *See, e.g.*, R.A. Duff, *Rethinking Justifications*, 39 TULSA L. REV. 829, 829 (2004) ("[W]hen one looks at the apparently interminable and irresoluble controversies that surround the topic . . . one must begin to wonder just what of substance is at stake and how far the substantive issues may be concealed or distorted, rather than being illuminated . . . by such a determined focus on the question of what counts as a 'justification' or as an 'excuse.'"); Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 LAW & PHIL. 557, 557 (2005) ("Few nontrivial claims about this distinction have attracted anything that approximates a consensus among legal philosophers.").

7. Just because something is an important reason for withholding criminal liability (factual innocence, for example) does not mean that it should or can be tested for directly.

8. Westen, *supra* note 1, at 328.

9. This Essay addresses the situations in which other scholars claim the distinction is important. The main sources include JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.05 (4th ed. 2006) [hereinafter DRESSLER, UNDERSTANDING CRIMINAL LAW]; Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349 n.124 (1989); Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1168 n.47 (1987) [hereinafter Dressler, *Justifications and Excuses*] (citing GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978) [hereinafter FLETCHER, RETHINKING CRIMINAL LAW]; George P. Fletcher, *Rights and Excuses*, 3 CRIM. JUST. ETHICS 17 (1984) [hereinafter Fletcher, *Rights and Excuses*]; George P. Fletcher, Commentary, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355 (1979) [hereinafter Fletcher, *Should Intolerable Prison Conditions*]; Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975)); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 61 n.2 (1984) [hereinafter Dressler, *New Thoughts*].

10. This point is illustrated in the authoritative treatise by Paul Robinson, which in Sections 31–39 (discussing "practical implications" of classification of defenses) focuses primarily on arguments and proposals for law reform, rather than setting out existing distinctions based on the justification/excuse distinction. 1 PAUL ROBINSON, CRIMINAL LAW DEFENSES §§ 31–39 (1984) (claiming that his arguments "demonstrate that some sort of overall conceptual organization of criminal law defenses is possible, that properly defined such a scheme can be logically sound and can bring conceptual clarity to a troubled area, and that within such a scheme lies the resolution of a host of thorny practical problems."); *see also, e.g.*, United States v. Jumah, 493 F.3d 868, 874 n.3 (7th Cir. 2007) ("The principal

in an individual case does not turn on whether it is a justification or excuse;[11] any complete defense ends a prosecution. There are no general rules applicable to justifications that do not apply to excuses (or vice versa), say, with regard to allocation or nature of the burden of proof, or the mitigating effect of a failed defense at sentencing.[12]

Nevertheless, Joshua Dressler, Paul Robinson and other major contributors to this debate assert that categorizing defenses correctly is important because whether a defense is classified as a justification or an excuse should affect the outcome in particular cases or shape other aspects of the criminal justice system. This claim is initially plausible. Some defense classifications are clearly important to the outcomes of criminal cases. For example, it matters whether a defense is complete or partial, affirmative or ordinary, constitutionally mandated or potentially subject to abolition by a court or legislature. It is also true that moral philosophy and jurisprudence are often relevant to criminal law doctrine, because persuasive arguments may affect decision makers' criminalization of particular conduct or lead to other rule changes to conform the law to principles of justice. But when attempting to identify precisely how the justification/excuse distinction, in itself, suggests anything about how cases should be disposed of in actual court systems, the question becomes more problematic.

A general warning sign suggesting that the concepts might be difficult to apply in a legal system is the broad scholarly dissensus about what they mean. If experts disagree about definitions and concepts, those definitions and concepts may also be difficult for lay jurors and non-academic lawyers. Scholars disagree about the concepts of justification and excuse in multiple dimensions. They

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distinction between justification and excuse lies in the concerns animating the affirmative defense.").

11. *See, e.g.*, State v. Leidholm, 334 N.W.2d 811, 815 (N.D. 1983) ("The distinction is arguably superfluous because whether a person's belief is correct and his conduct justified, or whether it is merely reasonable and his conduct excused, the end result is the same, namely, the person avoids punishment for his conduct."); ROBINSON, *supra* note 1, § 9.1, at 479 ("Justifications and excuses are similar in that both are general defenses and both exculpate the actor because of his or her blamelessness.").

12. In non-capital sentencing, courts seem to consider as potential mitigation both justification and excuse "defenses" that failed or were incomplete at trial. *See, e.g.*, United States v. One Star, 9 F.3d 60 (8th Cir. 1993) (fact that firearm was possessed for self-defense warranted downward departure); Hines v. State, 817 So. 2d 964 (Fla. Dist. Ct. App. 2002) (jury rejection of self-defense did not preclude consideration at sentencing); Smith v. State, 532 So. 2d 50 (Fla. Dist. Ct. App. 1988) (mental illness falling short of defense could be considered at sentencing); Westlake v. State, 893 N.E.2d 769 (Ind. Ct. App. 2008) (same). Since anything can be argued as mitigation in capital sentencing, *e.g.*, Buchanan v. Angelone, 522 U.S. 269, 276 (1998), the fact that both justification and excuse evidence is admissible is not particularly probative.

disagree at the conceptual level whether justification is defined objectively or subjectively (and therefore whether reasonably mistaken justification is justification or excuse), and, if objectively, whether "unknowing justification" is either the superior defense of justification or, instead, no defense at all.[13]

Scholars also disagree about categorization as justification or excuse of many individual defenses, including duress, provocation, and others.[14] Yet, scholars recognize that defenses they categorize as excuses can be satisfied by conduct fitting the definition of justification—and vice versa.[15] In addition, fact-finding using these concepts may require determining what would actually have happened in the future if circumstances had been different, and what third parties were actually thinking at relevant times in the past. Some versions differentiate between actual threats of harm and mere reasonable appearances of threat that did not actually exist. To apply these distinctions, juries must determine the actual intentions and future plans of, say, a perceived arsonist shot dead while reaching for the match.[16]

Notwithstanding the impressive intellectual efforts devoted to the task, no single scholar or viewpoint appears to be on the verge of generating practical consensus about the concepts of justification and excuse, categorization of the defenses, or categorization of difficult individual cases. Justification and excuse, then, will likely remain contested and controversial in broad concept, in individual cases, and at the intermediate level of particular defenses. In addition, adjudicating specific cases appears to require extraordinary fact-finding capabilities. Any legal system must pause before making its most important decisions rest on precise application of concepts that lack accepted definitions and appear difficult, perhaps impossible, to administer.

Advocates of the distinction make three main claims for the importance of developing and elaborating the justification/excuse distinction: that it 1) could with feasible changes in the law send clear moral messages about the disposition of criminal charges, particularly "not guilty" verdicts; 2) now shapes third party and accomplice liability; and 3) should be used to generate procedural rules, such as with respect to the burden of proof, for categories of defenses. This Essay, building on important and largely unan-

13. *See, e.g.*, PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 95–124 (1997).

14. *See supra* notes 3–5 and accompanying text.

15. *See infra* notes 67–70 and accompanying text.

16. *Cf.* Peter M. Tiersma, *Asking Jurors to Do the Impossible* (Loyola Law Sch. L.A., Legal Studies Paper No. 2009-12, 2009), *available at* http://ssrn.com/abstract=1352093.

swered criticisms by Mitchell Berman[17] and Kent Greenawalt,[18] suggests that none of these goals can be usefully advanced through the justification/excuse distinction. Accordingly, there is, so far, no convincing support for the idea that the distinction is important to the structure or operation of the legal system.

Part I proposes that defenses need not be categorized and labeled as precisely as crimes, either for jurisprudential or for practical purposes. Because the various crimes have different punishments and moral implications, they must be precisely defined in general and carefully ascribed in particular cases. By contrast, all non-convictions have identical punishment and the same criminal implications, and rest on the same general ground—given the procedural structure, there is insufficient evidence of guilt. Accordingly, functionally, a single category of acquittals is both accurate and sufficient. Subcategories may be of interest for various reasons, but do not have functions, and thus do not present the same compelling practical need for sensible sub-categorization as does, say, "homicide." A "not guilty" verdict by itself provides all the guidance necessary for future proceedings and punishment.

Part II addresses the major claim for the practical utility of the justification/excuse distinction: sending clear moral messages in cases of acquittal. Professors Robinson, Dressler and others argue that acquittal based on justification implies that the conduct was good or tolerable, while acquittal based on an excuse defense appropriately suggests that the conduct was undesirable. This argument is not correct.

An acquittal on any ground, including, for example, a reasonable doubt that any crime was committed, carries no legal implication of good behavior. One reason for the moral neutrality of acquittals is the burden of proof, necessitated by the inability of trials to determine absolute truth. Strong evidence of guilt of murder falling just short of the "beyond a reasonable doubt" standard results in an acquittal, but does not imply that the defendant did not in fact murder. This explains why no one in a bad marriage

17. Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 6 (2003) ("To be sure, so long as scholars are going to employ it, it's important that they should get the distinction right. But whether they should employ it at all is a separate question, one about which I am frankly skeptical."); *Id.* at 77 ("I hope to prod scholars to argue for their favored articulations of particular defenses (like particular offenses) in terms of good policy broadly conceived—justice, fairness, efficiency, administrability and the like—not in terms of conceptual or logical truths.").

18. Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89 (1986) [hereinafter Greenawalt, *Distinguishing*]; Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984) [hereinafter Greenawalt, *Perplexing Borders*].

with Robert Blake or O.J. Simpson would sleep easily. Similarly, strong disproof of a self-defense defense to murder falling just short of the prosecution's required burden results in acquittal based on justification, but does not mean that the defendant in fact acted in self-defense.[19] Under our system, a conviction assigns moral and legal guilt, but an acquittal does not necessarily indicate moral or legal innocence.

Criminal trials could be restructured to provide moral messages, but this would be no small project. Presumably, there is no point in generating more specific, but inaccurate moral messages. Accurate messages would require changing defenses and procedures so that in addition to determining legal guilt, they generated morally meaningful findings. Apparently no proponent of creating morally meaningful verdicts has explained the specifics of how the criminal justice system would be reframed to accomplish this end.[20] The constitutional, financial, practical and technical problems with this project are daunting, and are probably sufficient to explain why it has apparently never been attempted.

Part III addresses the claim that the justification/excuse distinction helps allocate aider and abettor liability under existing law. The argument is that one helping a merely excused principal, say, an insane killer, should not have a defense, but helping a justified principal, one acting in self-defense, for example, should not be punished. However, modern codes, appropriately, impose liability based on the defendant's conduct and mental state. Thus, the real question is what the defendant thought they were doing. If a defendant intended to aid a felonious killer but in fact aided a lawful actor, they should at least be liable for attempt; by the same token, a defendant who reasonably believed she aided lawful conduct should not be condemned because the principal unexpectedly turned out to be a criminal. On the modern view, whether the principal was justified, excused or engaged in no criminal activity is less important than is the evaluation of the defendant's personal culpability.

Part IV responds to the argument that classes of defenses should be treated similarly. For example, Professor Dressler suggests all excuses should have similar, higher requirements because they represent bad conduct that the state should not encourage. Alter-

19. *Jurors Clear Millionaire In Murder Trial*, KPRC HOUSTON, Nov. 12, 2003, http://www.click2houston.com/news/2628046/detail.html (on file with the University of Michigan Journal of Law Reform); Rob Margetta, *Logic, Not Emotion, Drove Chieppa Verdict, Jury Says*, THE STANDARD-TIMES (Mass.), Mar. 29, 2007, *available at* http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20070329/NEWS/703290367/1011/TOWN10.

20. The most elaborate attempt I am aware of is described *infra* note 77.

natively, as Professor Fletcher suggests, perhaps all justifications should have similar, higher requirements because the defendant is claiming a benefit premised on a claim of good conduct. The widely acknowledged possibility that justification defenses can be satisfied with excuse conduct, and vice versa, make this sort of categorical treatment unwise. Moreover, defenses in the same group differ so widely that there is no compelling reason to treat them identically without regard to their individual characteristics and elements.

I. THE CORE PROBLEM: DOES NON-PUNISHMENT REQUIRE JUSTIFICATION AS DOES PUNISHMENT?

Because punishment requires justification,[21] criminal liability must be warranted on some set of moral and perhaps political[22] grounds. A person cannot be punished without a convincing rationale to punish. The opposite is not the case; it is not true that a person can avoid punishment only if there is a convincing rationale not to punish.[23] Accordingly, analytical justification of

21. *E.g.*, Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258 (2008); Paul Butler, *Retribution, For Liberals*, 46 UCLA L. REV. 1873, 1876 (1999) ("A basic moral obligation is to do no harm. Punishment, therefore, requires justification."); Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 272 (2005) ("[I]nflicting punishment requires justification . . . . " (citing R.A. DUFF, TRIALS AND PUNISHMENTS 1 (1986) ("It is agreed that a system of criminal punishment stands in need of some strenuous and persuasive justification . . . .")")); Markus D. Dubber, *Legitimating Penal Law*, 28 CARDOZO L. REV. 2597, 2597 (2007) ("As a form of state action, punishment requires a political, not merely a moral, justification."); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2192 (2001) ("Punishment requires justification because its potential modes of corporeal violence, insults to one's dignity or reputation, and restrictions on an individual's liberty are all otherwise illegitimate social practices in the context of a well-ordered society."); Richard Wasserstrom, *Why Punish the Guilty?*, 20 PRINCETON UNIV. MAG. 14 (1964) ("[Punishment's] infliction demands justification."), *reprinted in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 328, 337 (Gertrude Ezorsky ed., 1972).

22. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 802 (1997) ("Some moral philosophers writing more recently have insisted persuasively that the imposition of punishment by the state is indeed distinctive and requires justification not only in moral, but also in political, theory." (citing NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 13–14 (1988); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 221 (1973); Michael Philips, *The Justification of Punishment and the Justification of Political Authority*, 5 LAW & PHIL. 393, 394 (1986))).

23. That is, a "not guilty" verdict does not require proof beyond a reasonable doubt that the defendant did not commit at least one element of the crime. Non-liability without a convincing rationale for punishment pertains even if an individual has done something wrong or undesirable, such as having forgotten a loved one's birthday, inflicted a gratuitous insult, failed to show up for work without notice or good reason, or caused injury, albeit in the exercise of due care.

punishment is logically prior to, or simultaneous with, defense; it makes little sense to explore the precise contours of defenses until there are identified circumstances where people can be legitimately punished.

Logically and by their terms, the definitions of justification and excuse presuppose an existing theory of criminal liability and punishment from which the conditions warranting criminal condemnation have been developed. Everything not condemned by those reasons is not criminal and not punishable, not primarily because it is a justification, excuse or something else (although it may be describable as such), but primarily (or at least sufficiently) because it does not warrant punishment under the controlling set of reasons.[24]

The circumstances permitting punishment define by negative implication at least the general categories where punishment is not permitted. Thus, the "lack of blameworthiness" associated with an excuse defense is the absence of precisely the same "blameworthy mental state" required by the theory of punishment as a predicate for condemnation. The good or tolerable conduct exculpated by justification defenses is the same good or tolerable conduct that the theory of punishment has already determined should not be punished. Thus, to the extent that a theory of punishment itself dictates that extreme youth or reasonable response to an unlawful assault precludes criminal conviction, the law does not need a distinct theory of justification and excuse that can be used to develop particular defenses.

The elements of a defense are of course important. It may be that the theory of punishment dictates every detail, including, for example, whether a person assailed outside their home must (or need not) retreat if possible before using deadly force, or that a person who provokes an assault with insulting words is (or is not) denied the right to use force in self-defense. Alternatively, it may be that at a certain level of specificity, the force of the theory stops dictating details, which can and must be supplied by courts or legislatures, and thus that the elements of defenses can legitimately vary from jurisdiction to jurisdiction. If the former, defenses are

24. Leaving aside burden-of-proof issues, it is arbitrary whether the existence or nonexistence of a fact is made an element of an offense, or denominated a defense; the law could provide, for example, that an element of a particular offense was that the defendant was not a police officer, or that being a police officer was a defense that the state had to disprove beyond a reasonable doubt. *See* Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1567 (1999) ("That the law has distributed the criteria for nonculpable right actions between the prima facie case and the defenses is of no moral concern . . . ."); Westen, *supra* note 1, at 299–301.

artifacts of the theory of punishment; if the latter, they are independent of it. But the categories of justification and excuse do not have moral logic of their own, of equal rank to the moral theory of punishment, pushing against and sometimes changing outcomes that otherwise would obtain based on the theory of punishment alone.

The functional differences between categories of conviction and categories of acquittal also explain why greater moral rigor and theoretical consistency in categorization is required for the former than the latter. Within human capacity, a criminal statute may not include non-punishable conduct or it will allow unjust convictions for innocent behavior. But it is insufficient that all of the conduct that a particular criminal statute describes is punishable. Statutes must also be sufficiently precise that crimes are differentiated. An operationalized moral theory might lead to the conclusion that there should be two kinds of criminal conversion of property, say, non-forcible theft and robbery, and that robbery should be punished more severely than theft without force. In those circumstances, it would lead to injustice if the statutes were drafted in a way permitting conviction for one when the fact-finder found the other. Without careful differentiation between crimes, offenders might be over-punished or under-punished, and morally over-condemned or under-condemned.

In any given case, much less categorical precision is required not to punish than to punish. Non-conviction can be for any number of legal, evidentiary, factual or policy reasons, some but not all of which involve not having committed the offense, or recognition of the existence of defenses. In spite of their diversity, all reasons leading to a "not guilty" verdict, or, for that matter, any other situation in which a person is not convicted of a crime, share a limited but fundamental similarity: they signify that operation of our best moral theory, put into laws which are as good as we can make them, subject to conditions believed to be justice-enhancing such as legal procedures and burdens of proof, thus far, has not lead to criminal condemnation.[25]

The morally agnostic nature of acquittals is doctrinally explicit. As Justice Brennan said, writing for himself and Justices Marshall, White and Stevens, "[A]n acquittal can never represent a determination that the criminal defendant is innocent in any absolute

25. This argument presupposes that police and prosecutors make reasonable efforts to ferret out crime, and are given reasonable resources with which to do so.

sense."[26] For this reason, the Constitution permits use of evidence of acquitted conduct to aggravate a sentence for a different crime.[27] Less controversially, an acquitted individual may nevertheless face a civil suit, or negative personnel action.[28] Because acquittal on any ground leaves open possible underlying circumstances ranging from actual innocence to factual guilt, no moral message flows from the naked fact of a "not guilty" verdict, properly understood.[29] This includes dismissals or acquittals on technical grounds.[30] The message "this acquittal carries with it no

26. United States v. Scott, 437 U.S. 82, 107 (1978) (Brennan, J., dissenting); *see also* United States v. Powell, 469 U.S. 57, 64–65 (1984) (explaining that a "not guilty" verdict "does not show that [the jury was] not convinced of the defendant's guilt." (quoting Dunn v. United States, 284 U.S. 390, 393 (1932))); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) ("[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.").

27. United States v. Watts, 519 U.S. 148 (1997). This rule has been trenchantly criticized. *See, e.g.*, Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996).

28. *See, e.g.*, MODEL PENAL CODE § 3.01(2) (1980) ("The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct that is available in any civil action."); FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 9, at 576–77 ("Justified conduct in violation of the definition is not wrongful, but neither is it perfectly legal, as is conduct that falls outside the scope of the definition. This type of harmful conduct might, for example, support tort liability for the harm done.").

29. *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 180–81 n.7 (2006) ("While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. . . . Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof." (quoting People v. Smith, 708 N.E.2d 365, 371 (Ill. 1999))); People v. Ewing, 458 N.W.2d 880, 883 (Mich. 1990) ("While the meaning of a valid criminal conviction is clear . . . an acquittal does not necessarily mean that the defendant did not engage in criminal conduct. . . . As one court explained, 'A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence . . . . The jury needed only a reasonable doubt to acquit or quite plausibly it may have returned its favorable verdict because of lenity.'" (quoting United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989))).

30. Just as a lost object is always found in the last place one looks, when it is certain that a prosecution cannot succeed, resolution of other characteristics of the case is moot, and therefore properly back-burnered in a system required to make decisions about public safety, justice, and liberty. Therefore, Professor Robinson's contention that non-exculpatory public policy defenses should be treated specially is doubtful. He writes: "Nonexculpatory defenses not only threaten but clearly hinder achievement of the purposes of criminal liability. There can be little doubt that acquitting culpable persons who have admittedly caused the harm or evil prohibited by the criminal law must undercut the aims of special and general deterrence." 1 ROBINSON, *supra* note 10, § 32(e); *see also* ROBINSON, *supra* note 13, at 71. However, those pleading non-exculpatory defenses are virtually never "admittedly" liable. As the Supreme Court explained, "The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defence [sic] by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged." Davis v. United States, 160 U.S. 469, 485 (1895). This principle applies when particular defenses are pleaded. Mathews v. United States, 485 U.S. 58 (1988) (holding that it is not inconsistent to plead both entrapment and innocence); State v. Whitney-Biggs, 936 P.2d 1047 (Or. Ct. App. 1997) (defendant pleaded insanity, extreme emotional disturbance, and self-defense).

moral implication" has the rare virtue of being true and complete in every single case.

Because the legal function of a "not guilty" verdict is unitary, as a jurisprudential matter, there is no practical need to categorize its basis. For the criminal justice system's purposes, it does not matter whether the verdict was based on the state's failure to prove necessary facts that go to, say, jurisdiction, a mental element, a conduct element, a result element, identity, the absence of a general defense, the absence of a statutory defense, or the absence of a constitutionally-imposed non-statutory defense, or whether the failure of proof was based on credibility of prosecution witnesses, state's witnesses, or the defendant, or, while accepting the testimony of all witnesses, the quantity of proof. Once any fact essential to conviction has not been proved, both acquittal and non-punishment rest on firm jurisprudential grounds. A general finding of "not guilty" dictates both the just disposition of the case and the just level of criminal punishment. There may indeed be consequences for acquittees, but not from the judgment nor from the criminal justice system.[31]

II. DISTINGUISHING BETWEEN JUSTIFICATION AND EXCUSE TO SEND CLEAR MORAL MESSAGES

Although everyone not convicted of an offense is in the same position with respect to the criminal justice system, the law could be structured to give more precise moral guidance about why an individual was not condemned. Professor Dressler proposes that defenses should be categorized[32] as justifications or excuses so that the law can send accurate moral messages.

> [J]ustification defenses reflect society's judgment that certain conduct is tolerable or desirable while excuse defenses recognize those circumstances in which society considers it morally unjust to punish and stigmatize wrongdoers. When the law

31. Of course, there are moral implications to every individual's actual conduct, criminal or not, charged or not, convicted or not.

32. It seems fairly clear that he is addressing the categorical level; that is, the provocation plea should be regarded as a justification or excuse without regard to the facts of a particular case, but based on its general elements and nature. *See, e.g.*, Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 467–68 (1988). At the same time, he seems to argue that the general category is important so that it can be applied to individual cases. *Id.* at 468 ("There is considerable moral difference between saying that an intentional killing is warranted (partially or fully), and saying that it is entirely wrong but that the actor is partially or wholly morally blameless for his wrongful conduct.")

> fails to focus on the justification-excuse distinction it risks sending a false message.[33]

Professor Robinson agrees that "when an actor is acquitted under a justification defense, the message to the public may be unclear, especially since the verdict of 'not guilty' gives no hint that a justification defense is at work"; in excuse cases, "a simple 'not guilty' verdict" cannot always "convey the proper message."[34] The moral message of "not guilty" verdicts based on particular defenses is said to apply to individual cases. Thus, Professors Westen and Mangiafico characterize a justification as "the state's declaring to an offender, 'You did nothing that the criminal law in any way regards as *regrettable* under the circumstances.'"[35] According to Professor Dressler, a "defendant who raises a justification defense in a criminal prosecution says, in essence, 'I did nothing wrong for which I should be punished.'"[36] Professor Robinson asserts that "a finding of justification is a finding that the act was justified."[37]

Clearly, convictions function as these scholars suggest; crimes are precisely identified in verdicts to send accurate moral and legal messages. Many people have moral intuitions with regard to, say, burglary, or shoplifting, and apply that intuition to any individual convicted of those offenses. This is appropriate in that a valid conviction represents a finding that every element of a particular offense has been proved beyond a reasonable doubt. It would be a significant moral problem for someone guilty of one offense to be treated by the legal system as though she had committed an offense of greater or lesser severity or one with different elements.[38]

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33. Dressler, *Justifications and Excuses*, *supra* note 9, at 1169.

34. 1 ROBINSON, *supra* note 10, § 32(c)–(d). Professor Fontaine apparently agrees that moral labeling is a critical reason for the distinction. Fontaine, *supra* note 5. Even Professor Greenawalt agrees that "[t]he law's treatment of justification and excuse should generally track moral understanding." Greenawalt, *Distinguishing*, *supra* note 18, at 108; *see also, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 54 n.270 (1994); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 111–12 ("Although both justification and excuse exculpate, conflating the two in a single defense can also have practical significance. . . . [I]t distorts the expressive function of the criminal law because it becomes impossible to determine whether a particular decision expresses approval of the defendant's use of force or merely absolves her of responsibility.").

35. Westen & Mangiafico, *supra* note 3, at 866.

36. Dressler, *Justifications and Excuses*, *supra* note 9, at 1161. Actually, this more accurately describes the meaning of a plea of "not guilty." *See supra* note 29. Pleading a specific defense, such as self-defense, says, "In addition to the state being unable to prove my guilt, there is another reason that I cannot be convicted."

37. Robinson, *supra* note 9, at 275.

38. *See, e.g.*, Franklin v. State, No. CR-06-1870, 2008 WL 5517604 (Ala. Ct. App. Dec. 19, 2008) (where it was not clear which of two crimes jury convicted on, defendant could only

However, non-convictions do not work the same way. Proponents of the justification/excuse distinction seem to recognize that no moral message should be drawn from general verdicts of "not guilty"; the law "fails to focus" on the substantive meaning of acquittals now, says Professor Dressler; acquittals "give no hint" of their basis, says Professor Robinson. These observations correctly reflect the legal doctrine that the fact that a person is not charged or not convicted of a crime does not demonstrate that they are innocent; the burden of proof requires acquittal in the face of strong evidence of guilt, unless the evidence eliminates every reasonable doubt. Thus, any false moral messages that might be drawn from acquittals alone are error, because by structure and design, no moral message flows from acquittals under existing law. The best available argument for the justification/excuse distinction, then, is that further classification is desirable not because existing verdicts are misleading, but because general acquittals represent a missed opportunity to offer moral guidance.[39]

Second, moving from individual cases to statutes—as to both crimes and defenses, criminal codes are reasonably clear morally without labels. Imposition of the justification/excuse label on top of existing conditions for liability is unlikely to add moral clarity to criminal codes, and risks moral confusion. Drawing a moral message from the requirements of an individual defense is more likely to produce an accurate evaluation of the moral consequences of a particular defense than is placing the defense in a larger category, like justification or excuse, and then trying to extract a moral message from the aggregate grouping.

A. Moral Clarity in Individual Cases

Scholars have identified several practical roadblocks to the assignment of moral messages to individual verdicts. Mitchell Berman suggests that the law cannot morally label individual criminal outcomes because of the non-identity of moral principles and criminal codes—some morally justified conduct is not criminally justified, and vice versa.[40] Kent Greenawalt points out that the

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be convicted and punished for the lesser); State v. McBride, 504 So. 2d 840 (La. 1987) (evidence did not support greater offense; although evidence supported lesser offense, court could not direct conviction of lesser when it was not clear that jury found every element of that offense).

39. *See* ROBINSON, *supra* note 13, at 204.

40. Berman, *supra* note 17, at 11–17.

general verdict conceals the basis for, and thus the moral implications of, particular verdicts.[41]

They acknowledge that these problems are soluble if the goal is sufficiently important. Assume that in a given jurisdiction, the principles of punishment flowing from the best moral theory are identical to the unanimous considered moral judgments of the people and their elected representatives, resolving Professor Berman's objection. Assume also that all defenses are categorized as justifications, excuses or another appropriate category, and that labeling is so important that the general verdict is abolished in favor of verdicts explaining the basis for acquittals, resolving Professor Greenawalt's objection.[42] Even with special verdicts and agreement on moral principle, it would be very difficult to draw clear moral messages from jury verdicts and other decisions.

1. The Deliberate Ambiguity of Acquittals

The law is clear that not being charged or convicted is not equivalent to being innocent.[43] This moral neutrality offers significant advantages to the criminal justice system. As Cass Sunstein[44] and John Rawls[45] have written in connection with other legal decision makers, there are substantial benefits to systems that generate agreement on outcome without requiring agreement on reasons, such as the current jury system. This approach is consistent with justice; surely, if all jurors vote "not guilty," the verdict is legitimate even if six jurors thought no crime had occurred and six others

41. Greenawalt, *Distinguishing*, *supra* note 18, at 106; Greenawalt, *Perplexing Borders*, *supra* note 18, at 1901.

42. ROBINSON, *supra* note 13, at 189–239.

43. *See supra* notes 26–31 and accompanying text. Thus, the humor in Bill Murray's dialogue with the U.S. Army recruiter in the movie *Stripes*:

> Recruiter: There's some questions I have to ask. They're a little personal. Have you ever been convicted of a felony or a misdemeanor? That's robbery, rape, car theft, that sort of thing?
>
> Murray: Convicted?
>
> Recruiter: Yeah.
>
> Murray: No. Never convicted.
>
> Recruiter: That's good. Good.

Drew's Script-O-Rama, *Stripes* dialogue transcript, http://www.script-o-rama.com/movie_scripts/s/stripes-script-transcript-bill-murray.html (on file with the University of Michigan Journal of Law Reform).

44. Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

45. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989).

believed an alibi defense—or if the vote represented any other mix of valid grounds for acquittal.[46] The Court has recognized that judges need not decide difficult questions if answering easy ones will resolve the case, both to promote efficiency and because decision makers forced to explore moot questions may not answer well.[47] Stopping deliberations as soon as an answer is reached saves the time of victims, judges, and prosecutors, and of jurors who are not required to explore questions irrelevant to the outcome of the case at bar. All of these actors can then turn to other matters, such as, for example, undecided criminal cases where public safety, individual liberty, and justice remain at stake. Stopping once the answer is determined avoids conflict and shortens service among jurors, thereby reducing incentives to avoid jury service.[48] On the other hand, if morally, factually, or legally determinative acquittals are to be sought, they will have to be achieved through processes reasonably calculated to answer those questions accurately. These procedures are likely to be much more elaborate than the current system of criminal trials. On this view, the traditional opacity of "not guilty" verdicts is both functional and virtuous.

General verdicts of "not guilty" are, apparently, constitutionally required,[49] and the trial of John Peter Zenger, among others, reflects that achievement of the general verdict was an iconic moment in the struggle for liberty. Opponents of the general

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46. *Cf.* Greenawalt, *Perplexing Borders*, *supra* note 18, at 1906. Perhaps it would be a mistrial if 12 jurors agreed that a defendant is not guilty, but disagreed as to their reasoning. Alternatively, perhaps they would vote individually, but it is difficult to draw a precise moral meaning from a verdict like "4 jurors-alibi, 4 jurors-self-defense, 4 jurors-complainant's testimony credible, but left a reasonable doubt that a crime took place."

47. *Cf.* Pearson v. Callahan, 129 S. Ct. 808, 821 (2009) (discussing multi-factor qualified immunity, suppression and ineffective assistance tests, and cases allowing courts to skip to dispositive elements directly to simplify the decisional process). The Court also questioned the wisdom of forcing decision makers to decide moot points. *Id.* at 820 (overruling doctrine that sometimes required a lower court, having found a dispositive fact, nevertheless to find and report on another constitutional question, stating that "there is a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue."); *see also* Caldwell v. Mississippi, 472 U.S. 320 (1985).

48. Of course, nothing would stop jurors from continuing to informally deliberate after the verdict was received if they regarded that as the highest and best use of their time.

49. *See* Harris v. Rivera, 454 U.S. 339, 346 (1981) (explaining that the jury has "unreviewable power . . . to return a verdict of not guilty for impermissible reasons."); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–60 (2003); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 131 ("[A]t some level, at least, nullification is implicit in the constitutional notion of trial by jury, because nothing else explains . . . why [a criminal] has a right to insist on a general verdict . . . ." (footnotes omitted)). For an argument against special verdicts in criminal cases, see *United States v. Spock*, 416 F.2d 165, 181–82 (1st Cir. 1969). *See generally* Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263 (2003).

verdict make the case for special verdicts, but they do not typically explain why the benefits outweigh any potential virtues of the general verdict. It is also unclear that special verdicts would work as proponents imagine.

a. The Procedural Context: Prophylactically Broad Defenses and Burdens of Proof

A foundational premise of the criminal justice system is that fact-finders have an imperfect ability to find the actual truth. Innocent people are convicted and the guilty are acquitted, based on a failure or inability to present to the jury what really happened outside the courtroom, or to have them evaluate it accurately.[50] Given, for example, events that took place without witnesses or illness or death of witnesses, incompetent or overburdened prosecutors and defense attorneys, exclusionary rules of procedure and evidence, and the phenomena of perjury and mistake, verdicts do not always reflect underlying truth. In addition, different juries may disagree on whether identical facts give rise to a defense. Sometimes jurors will break their oaths.

Of course, the system can only do the best that it can do—that there remains metaphysical doubt after a trial that is as fair as it can be made does not ordinarily warrant withholding moral judgment following conviction. However, the legal system has created rules and mechanisms premised on the fact-finding limitations of trials. Many theories of criminal punishment accept the moral proposition that it is better that a guilty person be erroneously acquitted than that an innocent person be erroneously convicted.[51] These conditions limit the ability of the criminal justice system to send clear moral messages from failures to convict, no matter how heroic the effort.

i. Prophylactically Overbroad Defenses

Just as there are good reasons for crimes to be drafted precisely,[52] there are good reasons for defenses not to be so tightly

50. *See generally* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997).

51. *See, e.g.*, Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

52. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004). And, at least in some cases, they are interpreted narrowly. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006).

drawn that they cover only the precise conduct they are designed to immunize. This may be an aspect of what Professor Greenawalt meant when he described the "necessary crudeness" of statute law.[53] Imagine a state allowing deadly force to arrest robbers.[54] Assume a high school student stole a bag of chips, and a shopkeeper blocked the door and attempted to grab the bag,[55] shouting "citizen's arrest!" The teen attempted to push the shopkeeper aside to escape, thereby committing a robbery.[56] The teen's wallet fell to the floor, revealing his photo identification and address. As the shoplifter ran away, the storekeeper thrice yelled, "Stop or I'll shoot!", but the shoplifter-turned-robber kept running. The storekeeper arrested the robber by fatally shooting him in the back. The police interviewed the storekeeper, who made statements further calling her action's morality into question: the storekeeper had looked for an opportunity to kill, and studied the laws to find a situation where it would be legal. She would not have shot if she had seen the teen at her church, or otherwise imagined him to be a good person, but thought he was a filthy immigrant leeching off the tax dollars of good people by living in a public housing project. The storekeeper found the experience erotic, and planned to repeat it as soon as legally possible.

While technically within the justification statute, this might well be regarded as an undesirable and immoral use of deadly force. Perhaps the law should not benefit people who are pleased when situations arise where force can be used. Even if deadly force should be used for serious armed robberies, perhaps it should not for minor robberies, or where the circumstances suggest an arrest will later be possible without deadly force. Perhaps bad motives should preclude the defense. On any or all of these grounds, the conduct can be condemned.

Yet, a legislature entirely sharing this moral outlook might conclude that the law should not be changed—just as the New York legislature has not added requirements to its statute[57]—not because such conduct is praiseworthy, or because it would be impossible to express in words why it was culpable, but because narrowing a defense to impose liability in more cases risks creating more injustice

53. Greenawalt, *Distinguishing*, *supra* note 18, at 107.
54. *E.g.*, N.Y. PENAL LAW § 35.30(4) (McKinney 2009).
55. *Id.* § 35.25.
56. *Id.* §§ 160.00(1), 160.05.
57. *Id.* § 35.30(4), Historical and Statutory Notes.

than is eliminated.[58] Recapitulating the principle that it is better to acquit the guilty than convict the innocent, prophylactic overbreadth helps ensure legal protection to people who deserve it. It performs an expressive function, reassuring the police and other actors that they should use warranted force, which could prevent death and injury to innocent people. Even if the legislative determination not to criminalize this conduct is considered (i.e., the legislature declined to act after a previous incident of this type), that the storekeeper avoided liability based on a defense categorized as a "justification" is neither evidence of legal defect nor any help to the actor's moral reputation.

The category "justification" in the criminal justice system means only that an individual has avoided liability based on a defense whose animating principle is that those who have done nothing wrong should not be punished. Even if the challenged conduct is within the statute, it does not necessarily mean that the actor has done nothing wrong, in the moral sense, in this particular case. Therefore, to assign a label to acquittees on this basis (say, "not guilty-justification") will be inaccurate to an unknowable degree in an unidentifiable number of specific cases, and to that extent fails to offer accurate moral messages.

ii. The Burden of Proof

The burden of proof for justification defenses stands in the way of both moral judgments and the claim that acquittal means that the defendant in fact did nothing the criminal law regards as wrong. The burden of proof is calibrated to avoid convicting the innocent at the cost of making it more difficult to convict the legally and morally guilty. No burden of proof can simultaneously be so stringent that it prevents all erroneous convictions (ensuring that all persons convicted are blameworthy) and so lenient that it prevents all erroneous acquittals (ensuring that all persons not convicted are blameless). Wherever it is set, there will be both some defendants who get the defense and do not deserve it, and others who deserve the defense but do not get it.

In many jurisdictions, the state must disprove self-defense beyond a reasonable doubt.[59] A jurisdiction could reasonably

58. "No . . . code can accurately prescribe the correct conduct in all situations; it can only provide an approximation of society's intuitive judgments." Robinson, *supra* note 9, at 271; *see also* ROBINSON, *supra* note 13, at 56.

59. *E.g.*, ARIZ. REV. STAT. § 13-205(A) (2006); Haw. Pattern Jury Instructions—Crim., Instruction 7.01 (1991); ME. REV. STAT. ANN. § 101(1) (1964 & Supp. 2005); N.M. UJI Crim.

conclude that this high burden is warranted, to prevent the occasional conviction of an innocent person.[60] Take, for example, North Dakota, which by statute deems mistaken justifications "excuses,"[61] signaling that it regards the distinction as important. Even in North Dakota, when there is clear and convincing evidence (but not proof beyond a reasonable doubt) that the defendant is a cold-blooded murderer who did not act in self-defense, the individual must be acquitted as "justified."[62]

In this way, all justification defenses are in part non-exculpatory public policy defenses. They sometimes exonerate the guilty because of substantive and procedural features intended to protect the innocent.[63] In no case, therefore, does a verdict of "not guilty," even one known through a special verdict or otherwise based on a pure justification defense, necessarily represent moral or legal exculpation. Thus, drawing a strong moral conclusion from any acquittal without examining the facts is not logical.[64] Proposals to draw moral messages from acquittals present the "disease as cure" problem, changing agnostic "not guilty" verdicts that are accurate in every case to potentially morally misleading ones by assigning reasons that will sometimes be false.

41.40 (1982); N.Y. Penal L. § 25.00(1); N.D. CENT. CODE § 12.1-01-03(1) (1985); People v. Saavedra, 67 Cal. Rptr. 3d 403, 410 (Ct. App. 2007); Geffkin v. State, 820 So. 2d 331, 335 (Fla. Dist. Ct. App. 2002); Carroll v. State, 744 N.E.2d 432, 433–34 (Ind. 2001); State v. Spaulding, 296 N.W.2d 870, 875 (Minn. 1980); State v. Jenewicz, 940 A.2d 269, 275 n.4 (N.J. 2008); Commonwealth v. Torres, 766 A.2d 342, 345 (Pa. 2001); Saxton v. State, 804 S.W.2d 910, 912 (Tex. Crim. App. 1991). *See generally* Jeffrey F. Ghent, Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R.3d 221 (1972 & Supp. 2009).

60. Even in a state requiring the defendant to prove self-defense, the preponderance of the evidence standard contemplates that in a thousand cases where the defense is successfully invoked, as many as 499 defendants might be acquitted though guilty.

61. N.D. CENT. CODE § 12.1-05-08 (1985).

62. State v. Falconer, 732 N.W.2d 703, 708 (N.D. 2007) ("A defendant is entitled to a self-defense jury instruction if there is evidence to support it, and the State must prove beyond a reasonable doubt the defendant did not act in self-defense.").

63. *Cf.* Greenawalt, *Distinguishing*, *supra* note 18, at 106 ("Legal categorization must usually be responsive to facts discoverable in the legal process. It cannot draw important lines on the basis of differences that are unascertainable by observers.").

64. This assumes that the accuracy of the conclusion is important. But if it is not, then there is no reason to modify the criminal justice system to generate unimportant moral messages. *See also infra* Part II.C (discussing the point that acquittals are likely to include many near-convictions as well as some wrongful prosecutions of wholly innocent people). That is, if babysitter candidates A and B were otherwise well qualified, and neither had ever been charged with or convicted of a crime, except that Candidate A had been charged, tried, and unanimously acquitted of First Degree Murder of an infant, most parents would prefer Candidate B.

2. The Non-Existence of Categorically Pure Defenses

Generating special verdicts that are meaningful as to justification or excuse would require major changes to the criminal justice system. Leaving aside defenses that prophylactically include culpable conduct, either substantively (through prophylactic overbreadth) or procedurally (through burdens of proof), labels assigned to existing defenses will be inherently ambiguous in individual cases. Existing defenses are not sharp-edged enough, to use Professor Greenawalt's phrase, to allow moral inferences even from special verdicts identifying their basis. A realistic description of the defense of, say, self-defense, is that the legislature put the defense in the code because *typically* people who meet the elements do not deserve punishment. The statute is drafted in such a way that *in most cases* it protects those, and only those, whom the legislature had in mind. When a person successfully invokes the statute, *normally* they are acquitted because they are not worthy of punishment. But these things are not always true.

Most existing defenses can be satisfied by facts characterizable as justification, and facts characterizable as excuse. Under the Model Penal Code (MPC),[65] for example, all justifications can be satisfied by excuse-type conduct. Most of the justification defenses are available based on an actor's "belief" that the elements exist, but the defense is lost as to reckless or negligent crimes if the belief is reckless or negligent under MPC § 3.09(2). MPC negligence means gross negligence; it is defined as "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[66] Therefore, if a defendant police officer honestly but with simple and not gross negligence believed deadly force was necessary to make an arrest warranted under MPC § 3.07(2)(b), the defendant could be convicted of no crime. The acquittal would be on the basis of a defense bearing the label "justification." However, should the situation arise again, society would not want the officer to kill an innocent person based on a lack of due care. Accordingly, the facts are in the nature of excuse.

By the same token, whatever else it has proved, the debate over the status of duress[67] has produced agreement that it can be satis-

65. MODEL PENAL CODE (1982).

66. *Id.* § 2.02(2)(d); *see also id.* § 1.13(16) (defining "reasonable belief" as "a belief that the actor is not reckless or negligent in holding.").

67. *See* Dressler, *Justifications and Excuses, supra* note 9, at 1170 n.57 ("Although necessity is a justification and duress is an excuse, one can easily posit circumstances in which the elements of either defense could apply."); Greenawalt, *Perplexing Borders, supra* note 18, at 1912; Huigens, *supra* note 3, at 1 (noting that Westen and Mangiafico "show that hypotheti-

fied both by facts characterizable as justification, and facts characterizable as excuse.[68] Even "excuse" defenses like mistake of law[69] or involuntary intoxication[70] or insanity can sometimes be satisfied by praiseworthy conduct that should be repeated if the circumstances reoccur. Defenses like the statute of limitations or speedy trial have elements of the public policy of repose independent of culpability, but are also grounded on potential inability to evaluate both justification and excuse defenses. They leave open possible underlying facts ranging from guilt on all charges to actual innocence.

Sending clear moral messages requires morally differentiated special verdicts.[71] This could be achieved by one of two approaches: by restructuring all defenses so that they represent pure cases of justification or excuse,[72] or by creating a new moral verdict, not tied to any particular defense, but inquiring directly whether the defendant's conduct was justified or excused.[73]

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cal cases that are identifiable as duress on relatively uncontroversial criteria are analyzable as cases of justified action.").

68. *See also* FLETCHER, RETHINKING CRIMINAL LAW, *supra* note 9, at 833–34 (noting, with apparent endorsement, that the German code combines duress and necessity into a single defense).

69. Professor Fletcher calls this an excuse. Fletcher, *Rights and Excuses*, *supra* note 9, at 19; *see also* ROBINSON, *supra* note 13, at 228. But imagine, for example, that in an emergency the mayor orders officers of a city police department to travel to another jurisdiction within the state. The officers doubt that they have authority to exercise police powers in that jurisdiction under state law, so the mayor obtains an injunction, affirmed by the court of appeals, holding that they have police powers in the other jurisdiction and must obey the order to travel. An officer, relying on the injunction, makes a probable cause arrest of a murderer under conditions that for a non-peace officer would constitute kidnapping. The next day, the state supreme court in another case holds that officers out of their jurisdiction, under the circumstances, had only the authority of a private citizen, and that the court of appeals decision is erroneous. This conduct, reasonable compliance with an apparently valid court order, is desirable and should be done again should similar circumstances arise. Although a mistake, it fits neatly into the definition of justification.

70. Imagine a kidnapper who drugs his victim, a DEA Agent. The victim, involuntarily intoxicated, kills the kidnapper, believing him to be Mussolini before the declaration of war with the United States. There is no justification defense, because the foundational motivation did not exist. Yet some might reasonably conclude that the killer is morally praiseworthy.

71. It could be argued that the imprecise moral messages that would be derived from special verdicts based on existing defenses would be good enough. However, for that argument to prevail, it would be necessary to explain why the existing imprecise moral messages that can now be derived from general verdicts, pleaded defenses and the trial record are not.

72. Ideally, scholars and other participants in the criminal justice system would reach substantial consensus on the classification of particular defenses and sub-defenses as justification or excuse; if they did not, the risk of erroneous moral messages would remain.

73. This approach is consistent with the work of Dean Heidi Hurd. *See* Hurd, *supra* note 24. Dean Hurd proposes that all action be categorized as culpable or non-culpable, and right or wrong, yielding the possibilities of actions that are: 1) culpable and right, 2) culpable and wrong, 3) non-culpable and right, 4) non-culpable and wrong. *Id.* at 1560. "We would thus do better to abandon the legal use of the terms 'justification' and 'excuse' altogether in favor of

Creating categorically pure defenses would be problematic. For example, instead of "not guilty" the verdict would be "not guilty-self-defense." But the substance of self-defense can be satisfied by either justification or excuse conduct,[74] and the government typically bears the burden of disproving it. Accordingly, the self-defense special verdict would have to be subdivided into, say, the justification defense of "not guilty-self-defense (actual)," and excuse defenses that might be something along the lines of "not guilty-self-defense (simple negligence)," and "not guilty-self-defense (objectively reasonable but in fact unnecessary)." Each verdict would have to be further subdivided to account for the burden of proof—for the verdict to be morally meaningful, the jury must explain whether it is reporting what actually happened, or, instead, it only means that the government failed to disprove some possibility under the governing standard. Of course, there would have to be similar special verdicts for each defense submitted to the jury, because there might be potentially differing moral messages among them.

Even such a special verdict would provide limited information if the jury's determination is restricted to the defenses on the books. The only way to obtain an ultimate moral judgment is to ask the moral question directly: Was the conduct "justified" under a general definition of justification, even if it did not satisfy the terms of any defense?[75] If limited to defenses on the books, then the verdict's moral meaning will remain merely a "necessarily crude" legal judgment. If not so limited, the time, expense, and scope of relevant evidence might be expanded substantially.

There is also the question of whether trials would be bifurcated, first determining guilt, and turning to trial of the moral basis of the verdict only in cases of acquittal. Bifurcation could allow exploration of moral questions without morally precise defenses, and avoid introduction of moral evidence in cases of conviction. However,

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talking about actions in [these] four ways . . . ." *Id.* at 1561. It is not clear that she proposes using these moral categories to restructure defenses, but her idea could be pressed into the service of that end. Similarly, Professor Robinson has noted, without proposing, that "[a] change in procedural rules to permit a culpability determination after the grant of a nonexculpatory defense" would make it possible to determine moral culpability. 1 ROBINSON, *supra* note 10, § 38(c). Of course, if there is value to exploring the true conduct of defendants who win dispositive motions or verdicts, the same value exists for those never charged because of the same legal impediments to conviction.

74. Paul H. Robinson, *Objective Versus Subjective Justification: A Case Study in Function and Form in Constructing a System of Criminal Law Theory* (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 08-23, 2008), *available at* http://papers.ssrn.com/abstract=1141982 (arguing that mistaken justifications should be regarded as excuses).

75. This could be done within the rule of law by enacting general definitions of justification and excuse into positive law. Thus, the jury could apply democratically approved general moral principles.

bifurcation raises even thornier practical questions. Would moral trials be required in every case, or only upon request of a party or victim? Would moral trials be required as part of plea bargains dismissing or reducing charges? Would moral trials be required even if the defendant's behavior were to be explored in a civil forum, such as in a wrongful death or civil commitment action? Would prosecutors, defendants and victims be required to participate even if they did not want to? Would defendants be entitled to free counsel if indigent? If not indigent, would defendants be required to pay for attorneys?

If unitary trials were used, would every criminal trial require admission in the case-in-chief of evidence relevant only to moral issues (because it will be difficult to know in advance which cases will result in acquittal)? In either unitary or bifurcated trials, would juries be required to decide guilt even if that question was difficult, and they could quickly conclude that one or more defenses were satisfied? Would moral verdicts be entered as judgments and given collateral estoppel or res judicata effect against a defendant or the state, or would they be for moral purposes only? Either way, could an acquitted defendant or prosecutor aggrieved by a moral verdict appeal if the outcome was correct but the reason was wrong?

However these questions are resolved, the project of drawing moral conclusions from acquittals is not a matter of putting general labels on duress, provocation, and other defenses and identifying the basis of decision with a simple and convenient special verdict. Rather, it would require potentially major restructuring of the criminal justice system. Unless proponents claim and show that moral verdicts are an indispensable characteristic of a legitimate criminal justice system, the benefits of categorization and information generation must compete with other goals of a system already claiming to be overburdened and underfunded:[76] cost, administrability, and effect on the accuracy of verdicts on liability. The imposition on juries, expanding their duties from deciding cases to generating moral information, would also have to be weighed.

Conceivably, moral trials are both possible and worthwhile; but to my knowledge no advocate of precise categorization has set out a concrete proposal offering chapter and verse about the structure of

76. Thus, additional trials are difficult to obtain, even for convicted persons with plausible claims of innocence. Charles I. Lugosi, *Executing The Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 473 (2005). It is difficult to argue that potentially assigning moral judgment to a person who may be guilty but will not be punished is more important to justice and to the public perception of justice than is potentially relieving moral and legal judgment from someone who might be innocent but is being punished.

such trials.[77] Therefore, at the moment, there is not even a claim that moral verdicts might be a practical addition to the criminal justice system. Operationally, no American jurisdiction has concluded that the rewards of morally precise special verdicts outweigh their costs and disadvantages. With neither a realistic proposal, nor any evidence of legislative movement, the project of distinguishing justification and excuse cannot be regarded as practically important to the criminal justice system because of its potential to facilitate morally precise verdicts.

B. Moral Clarity in Codes

If it would be difficult to use the justification/excuse distinction to assign moral messages to individual dispositions, perhaps the distinction would be useful in codes. Unquestionably, the law sends valuable moral messages at the categorical, statutory level. However, the law succeeds here without the necessity of labeling.

Codes identify crimes and specify punishments that are designed to be greater for crimes regarded as more serious. Many states classify crimes by levels, with ascending penalties based on ascending degrees of seriousness.[78] Statutory criminalization sends a clear moral message that certain conduct is undesirable—crimes are bad, those who commit them are criminals. Different classifications and sentences show that some are more blameworthy than others. In New York for example, forgery in the first degree[79] is a Class C felony, a serious crime punishable by up to fifteen years imprison-

77. The closest that I am aware of is in Paul Robinson's book, *Structure and Function in Criminal Law*. ROBINSON, *supra* note 13. Although he observes that "[a] code of adjudication is most useful if it includes all rules relevant to the liability decision," *id.* at 198, apparently no provision of the draft code addresses the presumption of innocence or the burden of proof for either crimes or defenses. *Cf.* MODEL PENAL CODE § 1.12(1)–(3) (1980) (imposing a burden of proof standard and explaining its parameters). Accordingly, it is simply not clear how these considerations would interact with special verdicts. And although he proposes a number of special verdicts, ROBINSON, *supra* note 13, at 204–07, 238–39, he does not discuss procedural implementation, such as jury instructions, the preclusive effects of the special verdicts, or the availability of appeals. Therefore, for all of the interesting ideas in the book, it does not constitute a testable proposal.

78. *E.g.*, ARIZ. REV. STAT. ANN. § 13-601 (2001) (creating six numbered classes of felonies, three numbered classes of misdemeanors, and unclassified petty offenses); N.Y. PENAL LAW § 55.05 (McKinney 2009) (creating five classes of felonies and three categories of misdemeanors).

79. N.Y. PENAL LAW § 170.15 (McKinney 2009).

ment.[80] Robbery in the first degree[81] is also a felony, but it is a Class B felony, punishable by up to twenty-five years.[82]

Defenses also reflect their moral characteristics in their requirements. For example, New York's self-defense statute provides that "[a] person may . . . use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force."[83] The insanity defense provides that it is a defense if the defendant "lacked criminal responsibility by reason of mental disease or defect" that prevented him from understanding "[t]he nature and consequences of such conduct" or "[t]hat such conduct was wrong."[84]

The elements, the substance of the statutes, send moral messages. Even though they do not explicitly declare it, the New York statutes send an unmistakable moral message that while forgery is bad, armed robbery is worse. The self-defense statute informs the "reasonable" person that they "may use" force to prevent an "unlawful" event—affirmative permission for a person with a good characteristic (reasonableness) to prevent a bad thing. The insanity defense relieves from "responsibility" those who have a "mental disease or defect" that prevents them from understanding what is going on around them. There is no hint that the conduct is praiseworthy or permitted; the statute merely provides that responsibility is relieved from some of those who are severely diseased or defective.

Regardless of the precise drafting of defenses, virtually any code providing exceptions to criminal responsibility under certain defined circumstances will have the quality of moral clarity, because the reader can tell whether the elements of the defense represent good or bad conduct. Some defenses are partial or incomplete, mitigating a crime to a lesser degree but leaving the defendant convicted. It is difficult to miss the moral message in these cases—the person who successfully invokes one of these doctrines remains a criminal.

It is doubtful that additional labels are useful here. First, the argument that justification and excuse are important labels because they are needed to send clear moral messages exists side-by-side with arguments that: 1) it is not always clear whether particular

80. *Id.* § 70.00(2).
81. *Id.* § 160.15.
82. *Id.* § 70.00(2).
83. *Id.* § 35.15(1).
84. *Id.* § 40.15.

defenses are justifications or excuses, and 2) sometimes justification defenses can be satisfied with excuse facts, and vice versa.

Fortunately, there is an option for sending moral messages other than categorizing the basis of acquittal as justification or excuse: namely, identifying the defense. Instead of saying, for example, that a statute "excused" a defendant from liability, the law could provide that "duress" is a defense to liability under particular circumstances. Whatever moral message flows from the elements of duress would flow without the intermediate step of classifying it as a justification or excuse. If sending a message by using a broad category like justification or excuse is useful, sending it by using the actual basis of decision is even better, just as calling a conviction "First Degree Assault" or "Aggravated Kidnapping" under a particular statute is more informative than calling it a "felony" or a "crime."

Conceivably, the law could add the justification/excuse classification to the information mix. For example, it could encourage legislators to identify all defenses as justifications or excuses, thus offering evaluators both the label and the elements. But the label adds nothing where the categorization is obvious. To claim that it is morally useful to label the defense of insanity as an excuse is to claim that people might otherwise miss the moral message that it is undesirable to kill innocent people because of a mental disease or defect that prevents the defendant from understanding the nature or quality of her actions.[85] Those whose moral intuition does not lead to that conclusion without a label are unlikely to find a label persuasive.

On the other hand, when the categorization of a particular defense is debatable, the practice risks inaccurately classifying an offense. Examination of the elements of the defense, perhaps in conjunction with an examination of the facts, offers a direct basis from which to draw a moral conclusion. In sum, we care about moral clarity at the statutory level. That goal has been substantially achieved, through careful definition of defenses, but without necessarily using labels or precise classifications to ascribe moral meaning to those defenses.

85. The independence of the moral message from the label might be tested by imagining the effect of a statutory absolution—"It is the policy of this state that a defendant acquitted of homicide who was unable to understand the nature of their actions because of mental disease or defect shall feel no guilt nor be regarded by any person in this state as having done anything wrong." This law would almost certainly be ineffective, because the moral judgment of the defendant's conduct will flow from the evaluation of the conduct, not from the assigned label.

Professor Westen offers a more limited proposal. Agreeing that the distinction should not be put to juries, he believes that legislators should consider the general principles of justification and excuse when they make law. When drafting or revising, they should ask themselves:

> What is the basis for this defense? Is it that actors who invoke the defense have produced no harm or risk that the state regards as regrettable . . . ? Or is it that, [even if they] engaged in conduct the state regards as regrettable or undesirable . . . they lacked certain additional features that must obtain for persons to be blameworthy for such conduct?[86]

On the one hand, these points are important, and have the virtue of containing in a few short sentences everything policymakers need to know about the debate about justification and excuse. With respect to defenses and all other civil and criminal regulation, policymakers should consider what conduct to encourage (while considering potential unintended consequences), and what conduct, though undesirable for moral and practical reasons, should not be regulated with particular tools. Yet, the very generality of the observation raises the question: Do these questions address an actual problem? Are there really criminal codes structured without awareness that good conduct should be encouraged and bad conduct discouraged (but not always punished)? One might assume that legislators as a group always take these things into account.

One piece of evidence of legislative thinking comes from recent statutes providing civil immunity for use of force for which the actor is not criminally liable. If legislatures immunize undesirable conduct (e.g., killings by the involuntarily intoxicated or by infants), but not good conduct (killings in lawful self-defense), or both bad and good conduct without distinction, that would suggest legislatures need much more guidance. On the other hand, if the statutes immunize only good conduct, that would suggest drafters grasp the point without need for additional elaboration of concepts of justification and excuse. An admittedly quick look suggests that legislatures do distinguish between good and bad conduct,

86. Westen, *supra* note 1, at 314; *see also* George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 955 (1985) (stating that "[t]he distinction between justification and excuse is of fundamental theoretical and practical value" and citing the framing of a criminal code as a practical application).

and have drafted with the difference in mind.[87] If encouraging legislators to distinguish between good and bad conduct is a main goal of the effort to define justification and excuse, it has been achieved through other means, without a definitive definition of justification and excuse and their differences, or assignment of all defenses to one category or the other.

C. Alternative Opportunities for Moral Education

Many proponents of the justification/excuse distinction contend that sending messages from non-convictions would be a valuable function of the criminal justice system.[88] If moral messages from

87. *See, e.g.*, ALA. CODE § 13A-3-23(e) (2005); COLO. REV. STAT. ANN. § 18-1-704.5 (2008); FLA. STAT. ANN. § 776.012 (West 2005); GA. CODE ANN. § 16-3-24.2 (2007); IDAHO CODE ANN. § 18-4009 (2004); KAN. STAT. ANN. § 21-3219 (2007); KY. REV. STAT. ANN. § 503.085 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 780.972 (West 2007); N.J. STAT. ANN. § 2A:62A-20 (West 2000); OKLA. STAT. ANN. tit. 21, § 1289.25(B) (West 2002); S.C. CODE ANN. § 16-11-450 (2003 & Supp. 2007); TENN. CODE ANN. § 39-11-621 (2006); TEX. PENAL CODE ANN. § 9.32 (Vernon 2003).

88. *See, e.g.*, ROBINSON, *supra* note 13, at 118–19. My intuition is that the public is not interested in this distinction. *Cf.* 1 ROBINSON, *supra* note 10, § 32(e) ("Yet, at present, few seem to be aware that such nonexculpatory defenses exist and fewer still seem to be aware of which defenses are of this sort."). The recipients of the moral messages with which proponents are concerned may be the public at large. Professor Dressler cites the example of protestors who won a civil disobedience claim on an excuse rather than justification theory. "As a result, their moral message was . . . lost." Dressler, *Justifications and Excuses*, *supra* note 9, at 1171. Before concluding that the public consciously regards the justification/excuse distinction as important in their moral universe, some evidence to that effect would be helpful. As a rough and ready test, I searched the enormous "USNP" database on Westlaw for the following: "("heat of passion" provocation duress) /p justification /p excuse." I found two arguably responsive articles. The first was a story about the oral argument in *Dixon v. United States*, 548 U.S. 1 (2006), which held in an opinion in which the justification/excuse did not loom large that the burden of proof for duress could constitutionally be placed on the defendant. *See* Gina Holland, *Court Takes up Battered-Woman Defense*, MIAMI HERALD, Apr. 26, 2006, at A5. The critical language in the story was that at the oral argument the prosecution "repeatedly referred to the duress claim as an 'excuse.' Justice John Paul Stevens, sounding irritated, said that the word 'justification' might also apply." *Id.* The other article was Margot Slade, *Justice is Stretched to Allow Wider Self-Defense*, N.Y. TIMES, Nov. 11, 1988, at B5, which reported:

> Graham Hughes, a law professor at New York University, said courts were moving "toward a more expansive view of legitimate excuses and defenses." He suggested, however, that the groundwork was laid in 1952, when the duress provision of the model penal code was amended. Like the self-defense justification, it originally required a coercive threat be imminent. The definition was expanded to include threats that were unmistakable even if not immediate.

Id. If the public does not pay attention to the distinction, then any fuzziness in the distinction will not be a problem with respect to them. (By the same token, if the general public is to benefit from the moral message, it is not enough for the law to make the distinction. In addition, some mechanism has to be found to educate them about it.)

non-convictions are valuable,[89] then the question is: What is the best way to generate those moral messages? It is far from obvious that the best approach is through "not guilty" verdicts in criminal trials.

Most trials receive no attention whatsoever, other than from lawyers, judges, jurors, defendants, and court staff. The system probably need not and should not be reformed primarily to provide more information to this group.

More valuable lessons might be derived from more comprehensive examination of the facts and legal arguments of the smaller number of trials that are the subject of media attention. Individuals could then draw their own moral conclusions.[90] Yet it is unrealistic to expect citizens to regularly read trial transcripts, pleadings, and trial orders so they can draw accurate legal messages from acquittals. If citizens now have insufficient guidance about legal behavior, it might well be more fruitful to suggest they read statutes and appellate cases, rather than try to derive meaning from individual verdicts.

Those who think sending moral lessons is an important function of individual cases could also consider an entirely different pool. One problem with assigning moral meanings to acquittal is that the clearest cases of innocence are disproportionately screened out before trial. Imagine a storekeeper who kills a man whom the storekeeper claims was a robber. The storekeeper's customers corroborate the explanation. The police might accept the story and make no arrest. If there is an arrest, the prosecutor might decline prosecution if the defense is clear-cut, or even if the defense is weak but the prosecutor believes it is in fact true (or that the defense is false, but the evidence for it is strong). If the prosecutor initiates a prosecution, the judge at a preliminary hearing or a grand jury might decline to charge.

Those charged in spite of claimed defenses are typically charged because one or more decision makers, rightly or wrongly, doubt the defense. Accordingly, compared to all persons, or to all persons investigated but not tried, those acquitted after trial are disproportionately those for whom the evidence of guilt was relatively strong,

89. A debatable point given that unappealable acquittals by unaccountable juries might be contrary to law, and are non-precedential, and therefore of little help to diligent citizens who study and rely on them.

90. In the handful of criminal cases generating media attention—O.J. Simpson, Martha Stewart, John DeLorean, Phil Spector, R. Kelly, Oliver North, Robert Blake, John Hinkley, Michael Jackson, Scooter Libby, the assailants of Vincent Chin and Rodney King—the major apparent lesson is that the verdict is not an authoritative moral message unless the jury's evaluation of the facts coincides with that of public or media evaluators, suggesting that further refinement is likely to be received with equal indifference.

and the evidence for any defense relatively weak. This is one practical reason that even successful justification defenses are not particularly probative of good behavior: many of them may be near-convictions rather than wrongful prosecutions of innocents. Therefore, subdivision of this group of acquittees is less likely to be accurate and meaningful than would be assignment of labels to members of other, more differentiated, pools. If formal exonerations are to be part of the law, it would seem reasonable to consider starting with individuals who prosecutors or grand juries never charged because of a conscious belief in actual innocence to see what actually resulted. The moral messages are more likely to be meaningful and accurate in this context.

III. LIABILITY OF THIRD PARTIES

Professors Dressler and Robinson propose that the distinction between justification and excuse is important, apparently as a matter of current legal doctrine, for determination of the liability of aiders and abettors of a principal who has a defense.[91] As Professor Dressler puts it:

> If A provides D with a gun in order to kill V, and D is acquitted on the ground of self-defense, it follows that A should also be acquitted of the offense since she has aided the primary party to commit a socially acceptable act. If D is acquitted on the ground of an excuse—let us assume, insanity—no reason of logic or policy requires the acquittal of A, assuming that she is not also insane or otherwise excused.[92]

Several scholars have argued that this approach is jurisprudentially unsound.[93] The principle also seems an incomplete description of current criminal law doctrine. As a specific application of a broader rule that "[i]f the acts of the principal . . . are

91. Robinson, *supra* note 9, at 279 ("If an act is justified, the conduct of anyone assisting in the act should also be justified. But if an actor is excused, the excuse should appropriately be limited to him and should not extend to others.").

92. Dressler, *Justifications and Excuses*, *supra* note 9, at 1173.

93. *See, e.g.*, Berman, *supra* note 17, at 62–64; Greenawalt, *Perplexing Borders*, *supra* note 18, at 1919 ("How the law should handle the intervention of others is too complicated a matter to be determined by initial characterization of a defense as a justification or excuse . . . ."); Douglas N. Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. CRIM. L. & CRIMINOLOGY 491 (1989); Westen, *supra* note 1, at 312 ("[T]he presence of justification does not determine whether third parties may assist an actor, nor does the presence of excuse determine whether third parties and an actor's victim may resist him.").

found not to be criminal, then the accomplice may not be convicted,"[94] some modern cases conclude that if a principal was justified, rather than avoiding liability on excuse or some other basis, then there can be no aider and abettor liability.[95] On their facts, these results may be correct, but because the justification of the primary actor does not mean that no others have committed a crime,[96] the rule is misleading. Another approach, that the defendant's criminal liability should be determined primarily by examination of his mental state and conduct, identifies the scope of liability in a wider array of cases.[97]

Defendants who believe they are assisting felonious killers are liable at least for attempt, even if the principal is in fact justified.[98]

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94. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.8(c), at 160 (1986). The Model Penal Code addresses this issue in one context at section 3.11(1), defining "unlawful force" as force "the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force." MODEL PENAL CODE § 3.11(1) (1980).

95. *E.g.*, United States v. Lopez, 662 F. Supp. 1083 (N.D. Cal. 1987); State v. Montanez, 894 A.2d 928 (Conn. 2006); Taylor v. Commonwealth, 521 S.E.2d 293 (Va. Ct. App. 1999) (en banc), *aff'd on other grounds*, 537 S.E.2d 592 (Va. 2000). The issue is not whether the principal was acquitted in some other proceeding. The Supreme Court has rejected the application of non-mutual collateral estoppel in criminal cases, so a third party's acquittal has no constitutional implications for another defendant's case. Standefer v. United States, 447 U.S. 10 (1980). Further, modern codes allow conviction of accomplices following acquittal of other participants. *See, e.g.*, MODEL PENAL CODE § 2.06(7) (1980). However, if the defendant's status as an aider and abettor depends on some other person's liability, that liability must be proved in the defendant's trial before the defendant can be convicted. *E.g.*, *Montanez*, 894 A.2d at 945 (defendant entitled to jury instruction on liability of principal); State v. Peel, 111 So. 2d 728, 742 (Fla. Dist. Ct. App. 1959) (although Holzapfel, the alleged principal, had been acquitted, Peel, the alleged aider and abettor, could be tried, but "the state would have the burden of proving Holzapfel guilty as the principal in the first degree before Peel could be found guilty as a principal in the second degree of aiding and abetting.").

96. For example, in some jurisdictions the justified killing of a felon by a victim or a police officer may leave co-felons guilty of felony murder. People v. Klebanowski, 852 N.E.2d 813 (Ill. 2006); State v. Oimen, 516 N.W.2d 399 (Wis. 1994).

97. *See, e.g.*, Wilson v. State, 222 S.W.3d 171, 181 (Ark. 2006) ("[T]he finder of fact must make a determination of the mental state of the person accused under accomplice liability."); Tharp v. Commonwealth, 40 S.W.3d 356, 365 (Ky. 2000) ("The principal actor's mental state with respect to his own conduct, or the degree of his criminal liability, is largely immaterial to the criminal liability of an accomplice or the degree thereof."); People v. Bartow, 800 N.Y.S.2d 200, 202 (App. Div. 2005) ("The defendant was charged as an accomplice, and when two persons are criminally liable for an offense which is divided into degrees, 'each person is guilty of such degree as is compatible with his [or her] own culpable mental state and with his [or her] own accountability for an aggravating fact or circumstance' . . . ." (citation omitted)); State v. Briggs, 197 P.3d 628, 632 (Utah 2008) ("An accomplice will be held criminally responsible to the degree of his own mental state, not that of the principal.").

98. *E.g.*, *Montanez*, 894 A.2d at 944 n.23 ("The fact that a person cannot be convicted as an accessory to justified conduct, however, does not preclude the conviction of that person, solely on the basis of his own culpability, of a substantive or inchoate offense arising out

Similarly, defendants may be liable for attempt or the completed crime if they know that the principal acts under a justification defense founded on a reasonable mistake or if they wrongfully created the occasion for actual justification.[99] A defendant who correctly believes the principal's conduct is non-criminal need not rely on the technicalities of aider and abettor law (that there is no crime to aid and abet), but can be exonerated on the morally significant basis of her own lack of mens rea. Similarly, the implication that defendants aiding merely excused conduct have no defense overlooks that those who reasonably believed they assisted non-criminal conduct have a defense even if the principal is liable.[100] What is determinative is not whether the principal was justified or excused, but whether what the defendant believed was going on amounted to a crime. Whether a principal or some other actor was excused or justified will sometimes correctly resolve cer-

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of the same incident." (citing Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 279–80 (1982))); MODEL PENAL CODE § 5.01(3) (1980) ("A person who engages in conduct designed to aid another to commit a crime . . . is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.").

99. See, for example, *People v. Williams*, 142 Cal. Rptr. 704 (Ct. App. 1977), which affirmed the murder conviction of a defendant who, during an unprovoked assault on the victim, asked a third party to kill the victim. The killer (the defendant's sister) was acquitted on the ground that it appeared to be lawful defense of a third party, yet the defendant was liable. *See also, e.g.*, People v. McCoy, 24 P.3d 1210, 1217 (Cal. 2001) ("[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator."); MODEL PENAL CODE § 2.06(2) (1980) ("A person is legally accountable for the conduct of another person when (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct . . . ."); 2 LAFAVE & SCOTT, *supra* note 94, § 6.8, at 160 ("For example, what if A shot and killed B upon a reasonable but mistaken belief that such deadly force was necessary in his own defense. This is clearly a defense to A, but should accomplice C, who aids A without such a belief, thereby go free? If . . . C gave aid with the intent that A kill B, it would seem that C should not escape liability." (footnote omitted)); *cf.* MODEL PENAL CODE § 3.07(4)(a) (1980) (a person assisting a peace officer in an arrest that turns out to be unlawful has a defense, "provided that he does not believe the arrest is unlawful."); Donald M. Zupanec, Annotation, *Acquittal of Principal, or His Conviction of Lesser Degree of Offense, as Affecting Prosecution of Accessory, or Aider and Abettor*, 9 A.L.R.4TH 972 (1981 & Supp. 2009).

100. *Montanez*, 894 A.2d at 944 n.24 ("Even if a principal does not act in self-defense, an accused accessory still may defend against an accessory charge by demonstrating that his act of soliciting, requesting, commanding, importuning or intentionally aiding the principal itself was committed in self-defense . . . ."); MODEL PENAL CODE § 2.06(3)(a) (1980) (an element of accomplice liability is that the defendant act "with the purpose of promoting or facilitating the commission of an offense."); 2 LAFAVE & SCOTT, *supra* note 94, § 13.3 ("But, on this notion that 'the liability of each is measured by his or her own degree of culpability,' an accomplice might well have a defense (e.g., self-defense) because of his or her own beliefs, without regard to whether the principal likewise has such a defense.").

tain issues, but examination of the defendant's mental state and conduct offers the doctrinally correct answer more often.

IV. REGULATING JUSTIFICATION AND EXCUSE BY CLASS

Professor Dressler has argued that the categories of justification and excuse might be important because similar defenses should be structured in similar ways. Perhaps all excuse defenses, for example, should be affirmative defenses where the defendant bears the burden of persuasion.

Once again, the premise may be questioned. Even if all excuse or justification defenses had common philosophical roots, particular doctrinal conclusions would not necessarily follow. I draw this inference from the codes based on principles of punishment. Even widely accepted moral principles do not imply a specific criminal code, except in the most general terms. Presumably almost every plausible candidate for the best moral theory will require a code prohibiting rape, robbery, murder, burglary, kidnapping and arson. At some point, though, broad principles stop dictating details. It is not so clear that an accepted moral theory will lead to an unambiguous determination of, for example, whether the code should criminalize using marijuana or alcohol, driving eighty miles an hour on the highway or having sex with a seventeen-year-old. Even in theory, many details are likely to be left to be fleshed out by lawgivers in particular jurisdictions. Even substantial differences in criminalization and punishment are not necessarily evidence of either injustice or of non-compliance with the theory of punishment.

If this is correct with respect to principles of criminalization, there is no reason that it should not also be true of defenses. Some defenses are likely to be implied by almost any moral theory; presumably no theory would categorically reject self-defense. However, acceptance of a particular branch or mix of retributivism or utilitarianism does not inevitably lead to a specific conclusion on whether, in a particular jurisdiction, the heat of passion defense should be available: 1) only when the victim committed a criminal act allowing the defendant to utilize non-deadly force, and the victim provoked the excessive force which caused the death; 2) whenever there is a reasonable explanation or excuse, regardless of the source of provocation or the identity of the victim; or 3) only as a factor to be considered in a sentence for murder. None of these choices are necessarily inconsistent with full acceptance of fundamental underlying principles. Even assuming for the moment that

justification and excuse are operative and significant parts of the theory of justice, many or most issues with regard to the details of defenses must be resolved by reference to some set of reasons other than that they are dictated by the theory of justice. If this is right, then arguments about common treatment of defenses have no claim to moral priority, but are ordinary arguments based on logic and reason, entitled to prevail if they are persuasive, and otherwise not.[101]

Professor Dressler proposes that the content of defenses might be shaped by whether the defense is a justification or excuse. "A plausible argument can be made for the rule that legislatures ought to require the government to carry the burden of persuasion regarding justification defenses, but that the defendant should shoulder the burden with excuses."[102] The rationale is that "[j]ustified conduct is lawful conduct . . . . With excused conduct, however, all of the elements of the crime have been proved and the conduct was determined to be unjustifiable."[103] The premises of the argument are debatable. Justification defenses are irrelevant—the jury never considers the case—unless every element of the offense can be proved *prima facie*,[104] so this is not a distinction from excuse defenses. In addition, that an excuse defense results in acquittal does not necessarily mean that the conduct was in fact unlawful; perhaps the decision maker accepted a definitive defense without reaching the merits. In addition, the lower the defendant's burden of proof, the more likely it becomes that defendants invoking justification defenses will be acquitted in spite of factual guilt. The distinction also puts great weight on definitive and correct categorization of defenses, an apparently intractable problem.

More fundamentally, if it is unjust to convict someone with a valid excuse defense, it is not clear why there should be any difference in the methodology used to structure criminal defenses—it is hard to simultaneously consider a defense mandated by the theory

101. Put another way, it would be bizarre for a theory to acknowledge that a jurisdiction could permissibly choose to reject a particular defense entirely, or adopt it. But if it adopts the defense, then the jurisdiction must determine the details of its elements by the implications of its classification as justification or excuse. That is, the concepts of justification and excuse are not powerful enough to dispose of large questions, yet they are so powerful that they dictate the answers to lesser questions.

102. Dressler, *Justifications and Excuses*, *supra* note 9, at 1172.

103. *Id.*

104. *See, e.g.*, FED. R. CRIM. P. 29(a) ("After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.").

of justice, and yet disfavored.[105] This is not to say that all defenses should have the same procedural requirements, but now legislatures and courts invoke general considerations of public policy—who has access to the information, the risk of fabrication of defenses, the consequences of erroneous denial, actual experience with the defense in courts, and where the burden should be allocated to facilitate accurate factual determinations. Put another way, while likes should be treated alike, that does not answer the question of whether the relevant similarity is categorization as excuse or justification, or some other similarity shared by particular defenses.

It would not be outlandish to conclude that the prosecution should bear the burden of disproving infancy but not insanity even though both are excuse defenses. Infancy is usually readily determinable on uncontroversial facts contained in government records, while insanity is within the particular knowledge of the defendant and is far more susceptible to fabrication. Perhaps the prosecution should be required to disprove mistake of law though it is usually characterized as an excuse, because the defense is based on government-induced conduct—it is unseemly to have the government induce conduct and then send you to prison unless you can prove that your conduct was upright. Similarly, while law enforcement is a justification defense, it might not be unfair to require a private citizen using deadly force to make an arrest of a fleeing felon to prove the circumstances warranting it. Once again, making arrests is justified conduct, yet society may not want to encourage casual use of deadly force, and those who engage in it may reasonably be expected to explain their basis for action. While none of these arguments are necessarily correct, if they are plausible they suggest that mere status as justification or excuse does not necessarily dictate how the defense should be structured.

Indeed, while accepting Professor Dressler's belief that the categories can shape procedural requirements, Professor Fletcher argues that requirements for justification defenses should be more stringent because of the moral implication that justified conduct was in fact good. If the person wants the benefit of a claim that their behavior was praiseworthy, perhaps they should show that

105. Professor Robinson recognizes the importance of excuse defenses in a way that suggests they should not be disfavored: "But the condemnatory function of the criminal law is [an] important goal; and the condemnatory function is undercut when a blameless person is punished. Convicting the truly irresponsible person taints the criminal law's credibility, leaving it too weak in subsequent cases to effectively condemn where condemnation is deserved." 1 ROBINSON, *supra* note 10, § 32(d).

their conduct was indeed praiseworthy. Thus, in the case of prison escape, Professor Fletcher explained:

> There is every reason for courts to interpret the imminence requirement more stringently in cases of justification. The claim of lesser evils must be viewed as an instance in which the individual citizen dares to override the legislative judgment about what in general should constitute criminal conduct. That the risk be imminent insures that the individual will interpose his judgment against the legislature's only in cases of inescapable emergency.
>
> In cases of excuse, the requirement of imminence should be applied more leniently, for the degree of impending danger is important only as it bears on the pressure driving the defendant to act.[106]

At a minimum, the idea that defenses should be treated categorically rather than individually should be advocated for empirically. Assuming that the MPC defenses or those in a particular jurisdiction are regarded as imperfect now, a researcher should reform them both by putting them in categories and revising the categories, and also by revising them defense-by-defense. If categorical treatment results in a more just, more administrable set of legal principles, that would be strong evidence that the approach should be replicated in other jurisdictions.

Professor Dressler also argues that the justification/excuse distinction has implications for whether defenses can be altered retroactively. Since individuals are not urged to act on excuses, like insanity, but are told to act on justifications, like self-defense, it would not be unfair to repeal an excuse retroactively, but it would be unfair to repeal a justification.[107] Leaving aside the doctrinal question of whether something not punishable can retroactively be made punishable based simply on an absence of reliance,[108] it is not clear that individuals do not rely on excuse defenses. Mistake of law, for example, is an excuse defense with reasonable reliance as an element.[109] The heroic individual who commits a trivial crime to avoid a credible threat to injure a stranger might rely on a du-

106. Fletcher, *Should Intolerable Prison Conditions*, *supra* note 9, at 1366–67.

107. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 9, § 17.05(f).

108. Stogner v. California, 539 U.S. 607 (2003) (holding that the statute of limitations cannot be retroactively extended to revive time-barred charges); Carmell v. Texas, 529 U.S. 513 (2000).

109. MODEL PENAL CODE § 2.04(3)(b) (1980).

ress defense,[110] even though duress is often classified as an excuse.[111] By the same token, justification defenses can sometimes be altered without affecting reasonable reliance; for example, if a Model Penal Code jurisdiction determined that justification defenses would be taken away based on any form of negligence, not just gross negligence, no one could claim that they relied on the right to engage in an ordinary lack of due care when evaluating whether to use deadly force in self-defense.

CONCLUSION

In jurisprudence and criminal law theory, there are valuable insights and intellectual rewards flowing from exploration of the nature of justification and excuse, independent of their utility for the criminal justice system. However, for scholars of public policy and legal doctrine, writing for and advising judges, juries, lawyers and legislatures, something fails to cross the border between theory and practice. Proposed definitions of justification and excuse are clear enough, but those definitions do not correspond closely to anything that happens in the criminal justice system. For quite persuasive reasons of substantive justice, administrability and constitutional tradition, in both statutes and verdicts, "justification" defenses are available to many whose conduct was morally culpable, and those who avoid conviction based on "excuse" may be factually innocent. The larger point is that a model that assumes defenses should be structured to send precise moral messages is unlikely to be useful to a system that uses defenses, and therefore has designed them, primarily to assign criminal liability, leaving final moral judgments of those found "not guilty," if they are to be had, to other systems.

110. Some courts hold that threats to third parties can trigger a duress defense. *See, e.g.*, People v. Coffman, 96 P.3d 30, 105 (Cal. 2004); Commonwealth v. Perl, 737 N.E.2d 937, 943 & n.13 (Mass. App. Ct. 2000).

111. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 9, § 17.05.